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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 638.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois.

APPELLANTS' REPLY BRIEF.

Appellants Were Denied the Notice and Hearing Provided for by the Statute and the Constitution.

Appellants' point that the order of April 30, 1936, in I. & S. Docket 3985, was made without notice and hearing is discussed at pp. 19-24 of their original brief. In opposition to this point appellees, the Southern railroads, contend that

the orders did not, in fact, require reductions to destination points which were not involved in the suspended schedules. This contention is made also by the Government and the Commission, and by the Southern shippers, in their briefs. In the brief filed by the Government and the Commission, it is also urged that the point was not raised by the bill of complaint and that appellants may not be heard on it now, because they did not go back to the Commission with a petition for rehearing, or modification, or clarification.

The proposition of the Southern railroads, in which the other appellees join, that the order did not require reductions to points not in issue but was confined to destinations involved in the suspended schedules, represents a complete *volte face*. It will be recalled that the actual tariff publication of rates on coke from the South to the North is in the hands of the Southern lines. In obedience to the order of April 30, 1936, in I. & S. Docket 3985, those Southern railroads reduced the rates to central territory destinations without any limitation and not merely to those destinations that were involved in the suspended schedules. That their interpretation of the Commission's order was that it required reductions to all central territory destinations is, therefore, clear and it is difficult to perceive by what process they can now assert that it required reductions only to the points in issue.

The assertion that the order did not require reductions to points in central territory without restriction is also refuted, appellants submit, by the Commission's statement in its last report in I. & S. Docket 3985 (215 I. C. C. 384) that (R. 37):

> "Specific rates should be published to all destinations to which shipments are likely to move."

Since the rates in the suspended schedules were published to specifically named destinations, if the Commission intended to require reductions only to those points it would seem clear that it would not have undertaken to tell the carriers what destinations rates should be published to.

It is asserted by certain of the appellees that this point was not raised in the bill of complaint in the lower court. The brief of the Government and the Commission states (p. 3) that the allegation that the order was made without a hearing "was limited by the bill of complaint, by the answers, and by the findings of the court below, to the issue as to whether the order, made after reopening and reconsideration on the record as it then stood, and without further hearing, deprived appellants of a full hearing. The bill of complaint, however, contained no such limitation. There was no reference made in appellants' bill to "reopening and reconsideration on the record as it then stood" or to any record. Indeed, the first of the three successive orders was made in I. & S. Docket No. 3511, the record in which was not before the Commission or the court in this case. Nevertheless, appellees, the Government and the Commission persist (brief, pp. 21, 22) in ascribing to appellants' brief and the bill of complaint language which is not there present. The bill of complaint averred as a ground of invalidity (R. 11):

> "4. That the third successive order of the Commission, dated April 30, 1936, was made without hearing, but only on petitions of southern carriers and shippers as aforesaid, is arbitrary and unjust, and is without any evidence to support it."

In connection with appellees' (the Government and the Commission) assertion that the point was only touched upon in the argument below, it should be noted that the presiding judge suggested (R. 565-567) that the argument should be confined to a "general outline of the positions," reserving full discussion for brief, and that the court then decided the case directly from the bench without giving appellants the opportunity to submit a brief. Nevertheless, in outlining the case, appellants asserted that the Commission denied appellants a fair hearing (R. 564) and elaborated on the point at pp. 608-609 of the record as follows:

> "I attempted to point out this morning that in this 3985 order the Commission reduced every coke rate in

> central territory although no such rates were in issue, except those where the northern carriers were attempting to bring a few rates that were below the 3511 scale up to the scale basis."

The point was also covered in appellants' proposed findings of fact (No. 21, R. 175) and conclusions of law (No. 2, R. 178).

The Government and the Commission contend that the appellants should have petitioned the Commission for a "rehearing or modification or clarification of the order." Had the appellants felt there was need for "clarification" of the order they would have petitioned for it. But—like the Southern railroads, appellees here,—appellants found no lack of clarity in the order. They read therein that the rates "to destinations in Illinois, Indiana, Ohio and the lower peninsula of Michigan" must be reduced and, in the report, which was by reference made a part of such order, that "Specific rates should be published to all destinations to which shipments are likely to move." The Southern railroads thereupon published rates to central territory destinations generally. They too found no lack of clarity in the order.

Appellees' suggestion, made for the first time here, that appellants should have petitioned the Commission for "rehearing or modification" as a condition precedent to their being heard in court is, we submit, without foundation in law. The Urgent Deficiencies Act, under which this suit was brought, does not impose any such obligation on appellants.

In *B. & O. R. Co.* v. *United States,* 298 U. S. 349, at page 371, this Court said: "No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carriers may sue to enjoin enforcement of an order of the Commission prescribing rates and divisions."

Moreover, appellants' attack upon the orders of the Commission rests upon other grounds in addition to that here discussed and which are independent of procedural matters. The Commission, having reduced the rates three times within a period of three years, each time purporting to change its mind as to what is "maximum reasonable" and each time finding something lower than the last to be maximum reasonable, it did not appear to respondents that these grounds would receive any real consideration from the Commission.

Only one of the appellees, *i. e.*, the Southern shippers, attempts to answer the point that the order is invalid because of a lack of notice and hearing, even as to those destination points which were actually included in the suspended rate schedules. With regard to these destinations (as well as all other central territory destinations) appellants assert that they were deprived of their right to notice and hearing because the Commission was at no time asked to prescribe rates in I. & S. Docket 3985. The step—and the only step—there asked to be taken was that the Commission find the rates in the suspended schedules unlawful. But the Commission did not do only that; it went further and ordered the carriers to reduce the existing rates and to publish and maintain in the future rates which it there prescribed. Appellants had no notice that the Commission would prescribe any rates, or do anything other than pass on the lawfulness of the rates contained in the suspended schedules. Indeed, not even did the petitions for reconsideration, which preceded the last report and order, ask the Commission to prescribe any rates. (R. 512 *et seq.*; 538 *et seq.*)

The Southern shippers assert (brief, pp. 15-16) that the Commission is given power to do this by Section 15 (7) of the Interstate Commerce Act. It is true that that section gives the Commission the power to make "such order with reference [to a suspended rate] as would be proper in a proceeding initiated after it had become effective." But it does not purport to grant this power without provision

for notice and hearing. Both Section 15 (7) and 15 (1) (which gives the Commission the power to prescribe rates) contain requirements for notice and hearing. It is submitted that as a condition to the exercise of the power to prescribe rates, notice must be given of the intention that rates will be prescribed if the suspended rates are found to be unlawful. When the only notice given is, as here, that the investigation will simply be into the lawfulness of the rates in the suspended schedule, the evidence is prepared to meet that issue and is confined to that issue alone. But, if notice is given that other rates will be prescribed if the suspended rates are found unlawful, it would seem obvious that the carriers must be given an opportunity to present evidence to show, among other things, within what limits rates might properly be prescribed, what the effect of possible prescriptions would be, and, conceivably, countless other matters entering into the fixation of rates.

The Orders of the Commission Were Against the Manifest Weight and the Indisputable Character of the Evidence.

It is difficult to understand the appellees' (the Government and the Commission) treatment of this subject in their brief. The outline and description of the evidence and the contentions of the parties regarding it, we believe, constituted a clear-cut and convincing demonstration of the Commission's failure to decide this case according to the manifest weight and the indisputable character of the evidence.

Without citing any page of the record to support the statement, the Government's brief says (pp. 25, 54) the evidence was conflicting. This is not true, so far as facts bearing upon the reasonableness of rates is concerned, for as we pointed out in our original brief the witnesses for the southern interests agreed that the rates here contended for by appellants, *i. e.*, the scale 3 prescribed in I. & S. Docket 3511 for interterritorial application, was not in excess of rea-

sonable maxima. It was likewise admitted on all sides that transportation conditions in the South were more burdensome and expensive and therefore justified a higher level of rates interterritorially from the South to the North than prevailed within the latter territory. When the case was orally argued before the Commission, as this record shows, not one of the four representatives, who appeared and argued for southern producers and Southern railroads, contended there that the column 3 rates then proposed in the tariffs under suspension were in excess of reasonable maxima. And later, after the Commission had struck down those tariffs and stated that interterritorial rates on a somewhat lower basis might be established, the southern shippers and carriers, in the petitions for reconsideration they filed, made no claim of unreasonableness, but instead argued that the Southern roads should determine for themselves whether they would establish that basis and that the northern roads, although involuntary partners in the joint through rates, should be denied any voice in the measure of the rate to be charged on the traffic in question. (R. 514) In view of this condition of the record, we are at a loss to understand the statements made in the Government's brief.

The Southern interests, railroad and shipper, unquestionably sought the right to put into effect the same scale of rates as applied within the North, and the record does contain statements to the effect that higher rates would restrict or prevent the movement of southern coke into that territory. Such statements, even if accepted as evidence of probative value in cases involving prejudice or preference under Section 3 of the Interstate Commerce Act, can not seriously be said to constitute evidence of unreasonableness, which is the question in issue here. The point is that the Commission condemned rates as unreasonable under Section 1 of the Act, when there was unanimity in the evidence of all parties of record that those rates were not in excess of reasonable maxima, and not the slightest contention to the contrary was ever voiced in the arguments made

or petitions filed with the Commission by the Southern shippers and carriers.

What the Commission did, and the reasons for its doing so, are not proper subjects for speculation or surmise. It simply took the scale of rates it had ordered to be applied in central territory, and required that it be made applicable also from the South into that territory, because, as stated in its second report in I. & S. Docket 3985 (R. 35):

> "The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect."

But what was there stated by the Commission is quite apart from any question of the reasonableness of rates. The situation complained of by the southern witnesses could, as well, have been cured by an alternative order under Section 3 of the Act. The witness for the Birmingham producers stated in his testimony that even within central territory some of the rates fixed by the Commission were "low". (Rec. 368) If too low for central territory, where the southern witnesses admitted transportation conditions are more favorable and therefore entitled to rates lower than within the South or interterritorially from the South to the North, there was clearly no justification for projecting its application to southern producing points.

The Orders of the Commission Were Not Supported by Substantial Evidence.

Appellees in their several briefs make no real attempt to answer appellants' argument under this heading, at pages 28-36 of their original brief. Instead, they seek to confuse the issue by ascribing to appellants certain artificial conten-

tions, which they say (as in the brief filed by the Government and the Commission, at page 48) invites the Court to examine all the evidence, appraise it, and hold that the Commission erred in its judgment as to the facts. Nothing could be farther from the fact as is clearly apparent from appellants' brief. We say there was in the record before the Commission no evidence of a substantial nature, tending to support the orders complained of herein, and the authorities cited by appellees, instead of disproving appellants' contention, actually sustain them.

Because the Commission in the third successive order reducing interterritorial coke rates from the South to central territory finally required the established of the basis it had previously fixed within the latter territory appellees are forced to concede that it was the comparison with those rates and the existence of certain untreated and chaotic rates applying within the South which led the Commission to condemn as unreasonable all such interterritorial rates. The cases of *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, and *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, are especially relied on by appellees, the Government and the Commission, but the language quoted from those decisions (brief, pp. 46-47) plain demonstrates the error of the Commission in basing its findings on the compared rates.

In the *Louisville & Nashville Case,* for example, this Court accorded special probative weight to rates previously fixed by the Commission. It was such a scale of rates, prescribed in I. & S. Docket 3511, that appellants seek to have applied on the traffic in question. It was further pointed out in the Court's opinion in that case that allowance should be made for "dissimilarity in conditions", something that was not done by the Commission in this case, although it was admitted on all sides that conditions surrounding movement of the interterritorial traffic were more onerous and made transportation more expensive than within central territory. The Court there was speaking of rates which were

higher than all others. In the case at bar, the scale basis appellants are contending for is lower even than was fixed by the Commission for application wholly within the North in cases cited at page 27 of appellants' original brief, and exactly the same as was contemporaneously prescribed interterritorially from central territory to points west thereof.

In the *Skinner & Eddy Case, supra,* the quoted language is likewise predicated on "comparable service," something which is not here shown. The binding force of comparisons with rates voluntarily established by carriers scarcely merits discussion here, for whatever might be said with respect to use of depressed rates against railroads maintaining them, there is no showing that these appellants have in effect anywhere on their own lines a basis of coke rates lower than the reasonable maximum level fixed by the Commission in I. & S. Docket 3511 and the materially higher scale basis prescribed for the eastern part of their territory in the other cases previously mentioned. Appellees make no attempt to reply to appellants' showing on the point that the southern rates have never been treated by the Commission or revised by the carriers, that they are in a chaotic state and depressed because they were originally established, and have since been maintained, to meet the competition of coal and, therefore, under a long line of decisions of the Courts and the Commission are without any probative value as rate comparisons.

At page 67 of the Government's brief, it is said in this connection:

> "Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale."

The record does not bear out the foregoing statement. The following statement contains the rates of the Louisville & Nashville Railroad from Birmingham to all points, shown in exhibits of record, lying intermediate to central terri-

tory, and similarly all rates of the Cincinnati, New Orleans & Texas Pacific from Chattanooga to intermediate destinations on its line:

From Birmingham

To	Distance	Rate (cents)	C.F.A. Scale Rate (cents)	Percentage relation rate to C.F.A. scale (Per cent)
Decatur, Ala.	85	160	175	91
Nashville, Tenn.	205	203	245	83
Bowling Green, Ky.	278	293	275	107
Owensboro, Ky.	345	293	315	93
Henderson, Ky.	349	293	315	93
Evansville, Ind.	361	293	325	90
Louisville, Ky.	392	293	335	87
Cincinnati, O.	481	338	372	90
From Chattanooga				
Somerset, Ky.	177	259	225	115
Danville, Ky.	222	259	255	102
Lexington, Ky.	256	259	265	97
Cincinnati, O.	338	259	305	85

How can it be said then that the prevailing coke rates on those Southern lines are approximately the same as the central territory basis, in view of the wide variation in relation to that scale, and the fact that for hauls between 177 and 338 miles in the South a common rate applies, *i. e.*, $2.59, while in central territory the rate would range from $2.25 to $3.05 for those distances?

In dealing with certain revenue figures, it is said in the Government's brief (p. 44):

> "It seems more appropriate to take the figures excluding the Ohio River since these Ohio River crossings are reached and served by southern lines."

but appellees fail to grasp that many important points beyond the Ohio River should be excluded for the same reason. This is especially true of Chicago, and practically

every other city of importance in Illinois, as it is of Indianapolis and other Indiana points, which, like the Ohio River points referred to, are served directly by railroads extending from southern coke producing points.

The first of the three rate comparisons characterized in the Government's brief (page 40) as of outstanding importance was the scale of coke rates prescribed by the Commission in I. & S. Docket 3511 for application within central territory, and as to this case, appellees say:

> "These rates were prescribed by Division 4 of the Commission in Coke between Points in Central and Illinois Territories, supra, and are evidently satisfactory to the carriers, since they have made no complaint against them; and it may be noted that the Column 2 scale as so prescribed involved both increases and reductions and had for its purpose a uniform adjustment without materially increasing or decreasing carrier revenue."

But what appellees seemingly overlook is that in the very same report, Division 4 also fixed the scale of rates to be applied from southern origins to central territory, and what appellees say above respecting appellants' attitude towards the column 2 rates expresses as well their view of column 3 in its interterritorial application, save that its establishment resulted in very drastic reductions in carrier revenue.

In this connection, the statement appears several times in the Government's brief (pages 24, 49) that reductions flowing from the three successive rate orders was not more than 10 per cent. To many destinations in central territory, the reductions were far more severe. Thus from Birmingham to Cleveland, Ohio, the rate changes were as follows:

Rate in effect prior to order in I. & S. Docket 3511	$6.03 per ton
Rate ordered in I. & S. Docket 3511....	5.00 per ton
Rate ordered in I. & S. Docket 3985....	4.55 per ton
Total reduction	$1.48 or 24.5%

In the Government's brief (pp. 42-43) considerable stress is laid on the fact that 54 carriers in the North did not restrict their concurrences, but as there were then in effect to destinations on central territory lines named no rates other than the column 3 scale, to which reductions had been made as a result of the order in I. & S. Docket 3511 there was no occasion for lines like the Akron, Canton & Youngstown, Ann Arbor, Detroit & Mackinac, Wheeling & Lake Erie, and others, issuing further concurrences. Reference is made to those 54 carriers operating in the four northern states, but it is noteworthy that in the quoted language from the Commission report, on the same page of the brief, the Commission only refers in that connection to "carriers in Illinois territory that serve southern origins or have direct connection with such carriers, and the western trunk-line carriers."

Conclusion.

It seems unnecessary to make further reply to, or undertake correction of, various other statements and contentions advanced in appellees' briefs. They utterly fail to disprove the facts and arguments presented by appellants, or challenge the force and effect of authorities relied on by them. To the extent that they purport to state appellants' position with respect to the several grounds urged on this appeal, or contradict the legal effect of matters contained in appellants' brief, we submit that the grounds relied on are there clearly set forth and there is no occasion for appellees mistaking or misstating them. Appellants reiterate and reaffirm all that is there said, with respect to the unlawfulness and invalidity of the Commission's orders in I. & S.

Docket 3985, dated March 11, 1935, and April 30, 1936, and its order in I. & S. Docket 4198, dated April 30, 1936.

The decree of the District Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

BALTIMORE & OHIO RAILWAY COMPANY, ET AL.,
APPELLANTS,

versus

UNITED STATES OF AMERICA, ET AL.,
APPELLEES.

BRIEF FOR ALABAMA IRON & STEEL SHIPPERS CONFERENCE, APPELLEE.

J. V. NORMAN,
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HUGH WHITE,
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Dated at:
Louisville, Ky.,
March 17, 1938.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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